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# The Fairness Doctrine: A Double Standard For Electronic and Print Media

By Roscoe L. Barrow\*

THE fairness doctrine in broadcasting requires licensees to devote a reasonable percentage of broadcast time to coverage of public issues and to present such issues fairly by broadcasting contrasting points of view.<sup>1</sup> The United States Supreme Court has adopted a double standard in the application of this doctrine to broadcasting and print media. In 1969, the Court held in *Red Lion Broadcasting Co. v. FCC*,<sup>2</sup> a case involving the requirement that broadcasters grant a right of reply to persons attacked during a broadcast of a controversial issue of public importance,<sup>3</sup> that the fairness doctrine does not violate freedom of speech or press. In 1974, the Supreme Court held in *Miami Herald Publishing Co. v. Tornillo*<sup>4</sup> that Florida's statute giving political candidates a right of reply to personal attacks by newspapers during political campaigns was an unconstitutional infringement of freedom of the press.<sup>5</sup> Although the Federal Communications Commission (FCC) has applied the fairness doctrine to cable television,<sup>6</sup> the free speech and press issue has not yet arisen as to this medium.

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1. FCC Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26372, 26374 (1974) [hereinafter cited as Fairness Doctrine and Public Interest Standards].

2. 395 U.S. 367 (1969).

3. The FCC's personal attack rules have been codified. 47 C.F.R. §§ 73.123, .300, .598, .679 (1973).

4. 94 S. Ct. 2831 (1974).

5. For a perceptive, balanced discussion of the issues involved in *Miami Herald*, written before the Supreme Court decided the case, see Traynor, *Speech Impediments and Hurricane Flo: The Implications of a Right-of-Reply to Newspapers*, 43 U. CIN. L. REV. 247 (1974).

6. 47 C.F.R. §§ 76.205, .209 (1973).

The purpose of this article is to assess the double standard in application of the fairness doctrine to the electronic and print media. The time is propitious for raising anew the constitutionality of the fairness doctrine as applied to broadcasting and for testing the constitutionality of the fairness doctrine as applied to cable television. Both the emergence of cable television and fear of government domination of the news media, generated by actions during the Nixon administration deemed repressive of the media<sup>7</sup> and stimulated by the climate of the Watergate scandals,<sup>8</sup> increase the timeliness of such a reexamination. The specter of thought control by government instills fear of King John and induces trust in the media Barons. But a Runnymede is rare. The people need to know. The question arises whether the people's need to know will be fulfilled unless this need is converted into a *right* to know vis-à-vis King John and the Barons.

### The Need of the People to Know

The basic distinction between representative democracy and authoritarian government is that in a democracy social readjustment is sought through informed consent rather than coercion.<sup>9</sup> The Declara-

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7. Governmental activities deemed repressive of the media have taken several forms. Then Vice President Spiro Agnew and other administration spokesmen attacked the media for bias. *NEWSWEEK*, Nov. 24, 1969, at 88-90. Newspersons were subjected to selective investigation by federal agencies, and federal suits were brought to require them to reveal their sources. *Hearings on Freedom of the Press Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st & 2d Sess., at 416-38, 669-780, 988-97 (1971-1972). Newspersons' telephones were tapped. *NEWSWEEK*, June 24, 1974, at 26. A taped conversation between President Nixon and staff members disclosed a threat to encourage challenges to the *Washington Post's* applications for renewal of its radio and television station licenses because the *Washington Post* had a leading role in reporting the Watergate events. *Washington Post*, May 9, 1974, at C6, col. 1. In the view of the media, the Office of Telecommunications Policy (OTP) was politicized and its director, recommended a "carrot and stick" approach to induce favorable comment by broadcasters on the Nixon administration's performance. *Hearing on Overview of the Office of Telecommunications Policy Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess., ser. 93-2, *passim* (1973). For an analysis of activities of the OTP affecting the news functions of broadcasting and cable television, see Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communications*, 43 U. CIN. L. REV. 291 (1974). For an incisive discussion of the concerns aroused by governmental activities deemed repressive of the media, see H. ASHMORE, *FEAR IN THE AIR—BROADCASTING AND THE FIRST AMENDMENT*, *passim* (1973) [hereinafter cited as ASHMORE].

8. *Hearings on Presidential Campaign Activities of 1972 Before the Senate Select Comm. on Campaign Activities*, 93d Cong., 1st Sess., *passim* (1973).

9. Mayo, *The Limited Forum—An Analysis of Restrictions on the Discussion of Public Issues in the Channels of Mass Communication*, 22 GEO. WASH. L. REV. 261, 262 (1954).

tion of Independence evidences the influence on our Constitutional Fathers of Locke, who viewed people as by nature free and saw the bonds of civil society as necessary for their peaceful living together.<sup>10</sup> Hamilton feared that participation in government by the propertyless masses would undermine the new nation and favored decisionmaking by an aristocracy.<sup>11</sup> Jefferson, however, believed that the people, if informed, would make sound decisions.<sup>12</sup> This latter view has, of course, prevailed in this country. Freedom and responsibility go hand in hand. If the people do not participate in decisionmaking, representative democracy leans toward authoritarianism.

Consensus is necessary to support decisions. The people of the United States comprise all races, religions, cultures and economic conditions. The pluralistic interests of the American people can be an impediment to consensus on solutions to crucial problems. Enlightened participation in the decisionmaking process contributes to consensus. Hence, broad participation in decisionmaking should be encouraged.

Our problems grow more complex and time for decision shortens. Many question the capacity of the people to contribute to solution of our problems and favor decisionmaking by an elite. But this road incurs the risk that the elite's interest may be furthered at the public's expense. The secretive decisionmaking during the Nixon administration which contributed to President Nixon's resignation is a grim reminder that decisionmaking by the people is to be trusted beyond that of an elite.

H. G. Wells observed that "[h]uman history becomes more and more a race between education and catastrophe."<sup>13</sup> Since 1920, when Wells wrote, the race has been accelerated greatly by the nuclear age, space exploration, the population explosion, the energy crisis, and the fouling of the environment. Hence, the process of decisionmaking must be accelerated commensurately. To some this is sufficient reason to vest decisionmaking in an elite and to leave the people out of the process of government.

Centralization of communications and denial of access to the media isolate the individual and discourage his responsible participation in public affairs. The ordinary citizen's failure to participate in de-

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10. J. LOCKE, *TWO TREATISES ON GOVERNMENT* 348-49 (2d ed. P. Laslett 1967).

11. C. BOWERS, *JEFFERSON AND HAMILTON—THE STRUGGLE FOR DEMOCRACY IN AMERICA* 30-33 (1925).

12. *Id.* at 108.

13. H. WELLS, *THE OUTLINE OF HISTORY* 1198 (1949).

cisionmaking results substantially from his inability to inform himself on the issues. Yet if timely informed, the individual can make a valuable contribution to decisions on vital issues. Broadcasting and the print media have great capacity to inform. Potentially, cable television has even greater power of communication. In a wired nation, cable television can provide a forum for local, regional and national "town meetings."<sup>14</sup> Innovations in communications technology have thus provided another opportunity to win the race between education and catastrophe. These innovations should be pressed into the service of the people in order that their need to know may be fulfilled. Informed by the mass media, the citizenry would be able to participate adequately in self-government.

Although the mass media are capable of providing unbiased information, absent regulation this does not necessarily occur. The mass media are big business. The point of view of media management, with some exceptions, tends to identify with the wealthy end of the economic spectrum. It may be in the interest of this group to present one side of some issues and to neglect coverage of others. Frustration with the lack of adequate access to the media stimulated the "sit-in," an improvised forum for expression of views on vital issues which had not been ventilated adequately in the mass media. Tension from failure effectively to communicate in order to find timely solutions to a variety of social problems contributed to violence in the streets.<sup>15</sup>

Even though the media may desire to report fairly on the performance of government, they may not be able to do so because government often acts secretly or discloses only self-serving propaganda. The "leak" and "scare" tactics have long been used by government to shape public opinion. The Tonkin Bay Resolution, which gave President Johnson a basis for escalating the Vietnamese War, was adopted by Congress on the basis of partial information.<sup>16</sup> The secret bombing of Cambodia during the Nixon administration and the former president's statements relating to the Watergate affair which subsequent disclosures revealed to be inaccurate or incomplete<sup>17</sup> are merely a few ex-

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14. The technology for two way cable systems is described in the following sources. HERMAN W. LAND ASSOCIATES, *TELEVISION AND THE WIRED CITY* (1968); R. SMITH, *THE WIRED NATION-CABLE TV* (1972); Barrow & Manelli, *Communications Technology—A Forecast of Change*, (pts. I-II), 34 L. & CONTEMP. PROB. 205, 431 (1969).

15. See Allen, *Civil Disobedience and the Legal Order* (pt. II), 36 U. CIN. L. REV. 175, 188-89 (1967).

16. TIME, July 30, 1973, at 22; NEW REPUBLIC, Mar. 9, 1968, at 17-19.

17. President Nixon's contradictory statements regarding his complicity in the

amples of the government's desire to conceal or color information relating to vital issues.

An oft-quoted statement by Jefferson is that "[i]f left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate for a moment to prefer the latter."<sup>18</sup> This may be sound. Fortunately, we are not limited to such an extreme choice. The media should ferret out government concealment and propaganda; government should regulate the media to the limited degree necessary to assure fulfillment of the people's need to know without impairing the functions of either government or media.<sup>19</sup>

The impact of the mass media on public opinion is great. Some say that the greatest effect of the mass media is to reinforce existing attitudes.<sup>20</sup> However, on new issues where public predisposition is lacking, the media may have persuasive effect.<sup>21</sup> Managers of political campaigns with good reason allocate the bulk of campaign funds to use of the mass media.<sup>22</sup> The sharp decline in President Nixon's popularity and credibility in the wake of the lengthy Senate Watergate hearings indicates that when the people are informed adequately by the mass media they do change their attitudes.

The preferred position given to freedom of speech and press under our constitutional law is a recognition of the paramount importance to self-government of the free exchange of ideas. Judge Learned Hand observed:

[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritarian selection.

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cover-up of the Watergate affair have been summarized chronologically. *NEWS & WORLD REPORT*, Aug. 19, 1974, at 24-29; *Washington Post*, Aug. 9, 1974, "The Nixon Years," at 12-13.

18. C. BOWERS, *JEFFERSON AND HAMILTON—THE STRUGGLE FOR DEMOCRACY IN AMERICA* 108 (1925).

19. "The mere absence of governmental restrictions will not make newspapers and other instrumentalities of communication play their proper part in the kind of society we desire." 2 Z. CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 471 (1947) [hereinafter cited as CHAFEE]. "A limited right of access to the press can be safely enforced." T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 671 (1970).

20. J. KLAPPER, *THE EFFECTS OF MASS COMMUNICATION* 38-43 (1960).

21. *Id.* at 53-61.

22. Recognizing the impact of the mass media on elections, Congress in the Federal Election Campaign Act of 1971 formerly limited the amount which candidates in federal elections could spend on use of communications media. 47 U.S.C. § 803 (Supp. 1974). However this provision recently was repealed. *BROADCASTING*, Oct. 21, 1974, at 46.

To many this is, and always will be, folly; but we have staked upon it our all.<sup>23</sup>

And Mr. Justice Holmes wrote: "[T]he ultimate good desired is better reached by free trade in ideas . . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." <sup>24</sup> Mr. Justice Holmes's concept of a free trade in ideas presupposes a market to which there is access. But, just as the builder of a better mousetrap cannot effectively cry his wares in the modern industrial market without advertising in the mass media, the individual with a new idea cannot provide it an opportunity to compete for acceptance unless he has access to the mass media.<sup>25</sup>

The Supreme Court has stated that the purpose of freedom of speech and press is to assure "the widest possible dissemination of information from diverse and antagonistic sources."<sup>26</sup> Chief Justice Hughes emphasized the importance of maintaining "the opportunity for free political discussion, to the end that . . . changes, if desired, may be obtained by peaceful means."<sup>27</sup> Mr. Justice Douglas suggested that freedom of speech and press may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>28</sup> But the market may be closed to unpopular ideas, particularly in a medium which seeks compatibility between program and advertised product.<sup>29</sup> Of course, the mass media cannot accommodate all who may wish to speak or write. Thus, Professor Alexander Meiklejohn observed that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."<sup>30</sup> At least this measure fulfills the need of the people to know.

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23. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

24. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

25. Professor Jerome Barron describes the free market of ideas concept of free speech as "romanticism" under modern communications conditions and advocates a constitutional right of access for confrontation of ideas. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1678 (1967). Professor Barron's seminal article has been updated in his recent book. J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973) [hereinafter cited as *FREEDOM FOR WHOM?*].

26. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

27. *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

28. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

29. For the influence of the advertising function of broadcasting on programming, see Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633, 634-44 (1966) [hereinafter cited as *Balanced Program Service in Television*].

30. A. MEIKLEJOHN, *POLITICAL FREEDOM—THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960).

Our representative democracy depends upon a multitude of tongues in the market of ideas to reach sound decisions on vital issues. The need of the people to know must be fulfilled by the mass media if the public is to participate in decisionmaking and our representative democracy is to retain its character as a free society.

### The Fairness Doctrine in Broadcasting

The advent of chain broadcasting aroused concern that either government or private interests would use this powerful new medium to control the political process and public opinion. Herbert Hoover, at the Third Annual Radio Conference in 1924, warned:

[T]he greatest advance in radio since our last conference is the complete demonstration of the feasibility of interconnection [of a chain of radio stations]. It is our duty to consider the possibilities and potentialities of interconnection. . . . It would be unfortunate, indeed, if such an important function as the distribution of information should ever fall into the hands of the Government. It would be still more unfortunate if its control should come under the arbitrary power of any person or group of persons. It is inconceivable that such a situation could be allowed to exist. . . .<sup>31</sup>

Congress shared then Commerce Secretary Hoover's concern when it debated the bill which led to the Radio Act of 1927.<sup>32</sup> The statement of Congressman Johnson is illustrative:

There is no agency so fraught with possibilities for service of good or evil to the American people as the radio. . . . The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. . . . [I]t will only be a few years before these broadcasting stations, if operated by chain stations, will simultaneously . . . bring messages to the fireside of nearly every home in America. They can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.<sup>33</sup>

To guard against undue influence of broadcasting in elections, Con-

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31. Address by Herbert Hoover, Third Annual Radio Conference, 1924, *quoted in* FCC, OFFICE OF NETWORK STUDY, SECOND INTERIM REPORT, Docket No. 12782, at 114 (1965).

32. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

33. 67 Cong. Rec. 5558 (1926). The Supreme Court has observed that, in licensing and regulating broadcasting, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).



gress required broadcasters to provide opposing political candidates with equal opportunities to use broadcasting facilities for political purposes.<sup>34</sup> This application of the fairness in broadcasting principle to political elections is called "the equal opportunities in political broadcasting doctrine."<sup>35</sup>

Two years after congressional enactment of the rule, the FCC recognized that this fairness principle "applies not only to addresses by political candidates but to all discussions of issues of importance to the public."<sup>36</sup> Accordingly, the FCC applied the fairness doctrine to broadcasting, requiring that broadcasters devote reasonable time to broadcast of controversial issues of public importance and that they allocate reasonable time to all sides of such issues.<sup>37</sup>

The FCC emphasized that the purpose of the fairness doctrine is to contribute to an informed public opinion. In its 1949 report on Editorializing by Broadcast Licensees, the commission stated:

It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day . . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.<sup>38</sup>

In 1959, Congress, in amending section 315 of the Communications Act of 1934,<sup>39</sup> ratified the fairness doctrine, which the FCC had de-

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34. This provision was enacted as section 18 of the Radio Act of 1927, ch. 169, 44 Stat. 1170, and was re-enacted as section 315 in the Communications Act of 1934, 47 U.S.C. § 315 (1970 & Supp. 1974).

35. For an analysis of the equal opportunities in political broadcasting doctrine, see Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting*, 37 U. CIN. L. REV. 447 (1968) [hereinafter cited as *Doctrines in Broadcasting*].

36. Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32, 33 (1929).

37. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26374.

38. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

39. 47 U.S.C. § 315 (1970 & Supp. 1974).

veloped as an implicit element of this public interest standard.<sup>40</sup>

Freedom of press applies to broadcasting, of course, as well as to the print media.<sup>41</sup> Traditionally, the print media have been free of governmental regulation, but broadcasting has been distinguished from the print media on the basis of the limited radio spectrum which prompted licensing of broadcasters. Thus, in *National Broadcasting Co. v. United States*,<sup>42</sup> which upheld the FCC's chain broadcasting rules against attack<sup>43</sup> on the ground of freedom of speech and press, Mr. Justice Frankfurter wrote:

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. . . . The right of free speech does not include . . . the right to use the facilities of radio without a license.<sup>44</sup>

Under the scarcity concept, reasonable regulation of broadcasting does not violate freedom of speech or press because the natural characteristics of the radio spectrum limit access. Only those found best qualified to serve the public interest are granted licenses, and the need of the people to know is given paramount value in the scale of the public interest.

### The Red Lion Case

The fairness doctrine was upheld by the United States Supreme Court against attack based on freedom of speech and press in *Red Lion Broadcasting Co. v. FCC*.<sup>45</sup> During a broadcast by Red Lion, it was stated that one Cook had attacked J. Edgar Hoover and smeared Barry Goldwater. Cook requested time to reply and Red Lion refused to

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40. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1969). As Congress ratified the fairness doctrine in section 315 of the Communications Act of 1934, the FCC cannot abandon the doctrine without a further amendment by the Congress. However, Congress did not ratify every application of the fairness doctrine which the FCC had made. Thus, query to what extent the FCC can pare down its past applications of the fairness doctrine without violating the statute?

41. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

42. 319 U.S. 190 (1943).

43. The chain broadcasting rules prohibit the licensing of broadcasters who include in their affiliation contracts with networks provisions which inhibit broadcasters in their choice of programming to fulfill needs of the community served. 47 C.F.R. § 73.658 (1973).

44. 319 U.S. at 226-27.

45. 395 U.S. 367 (1969).

grant it. Cook then complained to the FCC, which found that Red Lion had not fulfilled its obligation under the fairness doctrine and ordered it to provide reply time.<sup>46</sup> Red Lion appealed.<sup>47</sup> Mr. Justice White, writing for the Court, based a finding of the constitutionality of the fairness doctrine on the scarcity of channels:

[T]he resource is one . . . for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential. . . .

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here . . . constitutional.<sup>48</sup>

Another rationale for sustaining regulation of broadcasting against attack on First Amendment grounds is the concept that in broadcasting there must be an accommodation of the interests of listeners and viewers, the licensed broadcasters, and a host of parties desiring access to broadcasting facilities, such as networks, independent program producers, syndicators, citizens' groups, and individuals. In 1925, then Secretary of Commerce Herbert Hoover, at the Fourth National Radio Conference, stated:

We hear a great deal about the freedom of the air; but there are two parties to freedom of the air, and to freedom of speech, for that matter. . . . Certainly in radio I believe in freedom for the listener. He has much less option upon what he can reject, for the other fellow is occupying his receiving set. The listener's only option is to abandon his right to use his receiver. Freedom can not mean a license to every person or corporation who wishes to broad-

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46. The broadcaster was ordered to provide the reply time free of charge insofar as no paid sponsorship was available. This obligation was imposed because otherwise the broadcaster would leave the public uninformed. *Cullman Broadcasting Co.*, 40 F.C.C. 576, 577 (1963).

47. During the litigation, the FCC, after hearing, adopted regulations applying the fairness doctrine to personal attacks and political editorials. 47 C.F.R. §§ 73.123, .300, 1598, .679 (1973). In substance, the rules provide that a person attacked during broadcast of a controversial issue has a right of reply, and that if a broadcaster endorses or opposes a political candidate the disfavored candidate or a spokesman for him has a right of reply. The Radio Television News Directors Association (RTNDA) brought an action challenging the rules on First Amendment grounds. The federal courts of appeals reached conflicting decisions in the *RTNDA* and *Red Lion* cases, the Seventh Circuit holding in *RTNDA* that the fairness doctrine, as applied in the personal attack and political editorial rules, violates freedom of speech and press. *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968); *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1968). The two cases were joined in the appeal to the Supreme Court.

48. 395 U.S. at 399-401.

cast his name or wares, and thus monopolize the listener's set. . . . The ether is a public medium, and its use must be for public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public. . . .<sup>49</sup>

Judge Learned Hand, who wrote the opinion in *National Broadcasting Co. v. United States*<sup>50</sup> for the three-judge trial court, was first to recognize in a judicial decision the interest of the listeners. Judge Hand was of the view that in broadcasting, where the freedom of speech and press of many different interests must be accommodated, the interest of the listeners is paramount. He wrote:

The interests which the [chain broadcasting] regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks."<sup>51</sup>

Later the FCC concurred in this view of the primacy of the interest of the listeners:

It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.<sup>52</sup>

In the *Red Lion* case, Mr. Justice White emphasized the preeminent interest of the viewers and listeners in applying the First Amendment to broadcasting:

[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by Government itself or a private licensee.<sup>53</sup>

### The Democratic National Committee Case

Some writers maintain not only that the fairness doctrine is in conformity with freedom of speech and press, but also that individuals have

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49. Address by Herbert Hoover, Fourth National Radio Conference, 1925, *quoted in FCC, OFFICE OF NETWORK STUDY, SECOND INTERIM REPORT, Docket No. 12782, at 80 (1965)*.

50. 47 F. Supp. 940 (S.D.N.Y. 1942).

51. *Id.* at 946.

52. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

53. 395 U.S. at 390 (citation omitted).

a right of access to broadcasting which is protected by the First Amendment.<sup>54</sup> However, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*<sup>55</sup> the Supreme Court held that persons desiring to present editorial advertisements via broadcasting do not have a right of access which is protected by the guarantee of freedom of speech.

The gist of the majority opinion, written by Chief Justice Burger, is that, in accommodating the several First Amendment interests in broadcasting, Congress and the FCC have chosen the fairness doctrine approach, in which the interest of listeners and viewers is paramount; insofar as limitations on broadcast time make it difficult to develop a practical plan for granting access to all individuals and organizations desiring access, the FCC's determination that the broadcaster is not required to grant access in advertising time segments to individuals or organizations to present editorial advertisements does not violate the freedom of speech of those denied such access. However, if the FCC could devise a practical system for granting access which also accommodates the several First Amendment interests involved, such a system would not violate the freedom of the press of licensed broadcasters.

The broadcasting channels are a public domain.<sup>56</sup> Without contravening freedom of speech or press, Congress could have adopted a regulatory framework for broadcasting under which stations were common carriers and persons were granted a right to speak on a first-come, first-served basis; or Congress could have divided broadcasting time on

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54. Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L.J. 89; Malone, *Broadcasting, The Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?*, 5 U. MICH. J.L. REF. 193 (1972). Professor Barron proposes extending such a right of access to newspapers. FREEDOM FOR WHOM?, *supra* note 25.

55. 412 U.S. 94 (1973). The FCC had ruled that a broadcaster who had met his obligation under the fairness doctrine to broadcast public issues was not required to accept editorial advertisements. *Democratic Nat'l Comm.*, 25 F.C.C.2d 216 (1970); *Complaint by Business Executives*, 25 F.C.C.2d 242 (1970). A divided court of appeals reversed in the joined cases, declaring that a flat ban on paid public issue announcements is a violation of the First Amendment, and remanded the cases to the FCC for the development of regulations governing the right of access. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

56. Congress, in the Communications Act of 1934, carefully preserved public ownership of the broadcasting channels lest they come under private ownership and the owners control public opinion and the political process. Thus, Congress stated that the purpose of the act is "to maintain the control of the United States over all the channels . . . and to provide for the use of such channels, but not for the ownership thereof." 47 U.S.C. § 301 (1970). The act requires licensees to waive expressly any right in the assigned frequency, which is normally granted for a three year term. *Id.* §§ 304, 307(d), 309 (1970 & Supp. 1974).

each channel between hours for commercial broadcasting and hours for noncommercial broadcast of public issues.<sup>57</sup> Congress chose a different course: it left to the licensed broadcasters "journalistic freedom consistent with its public obligations."<sup>58</sup> To assure that broadcasting would contribute its fair share to fulfillment of the need of the people to know, Congress required that broadcasters provide equal opportunities in the use of broadcasting facilities for political purposes, allocate reasonable time to the presentation of public issues, present all sides of such issues, and develop a balanced program service in the public interest.<sup>59</sup>

While the decision of the Supreme Court in *Democratic National Committee* recognized that the FCC in its hearing on the fairness doctrine<sup>60</sup> might prescribe a practical right of access by individuals to broadcasting which would be in conformity with the freedom of press of licensed broadcasters, the FCC has not been able to design such a plan.<sup>61</sup> The commission stated:

Our studies during the course of this inquiry have not disclosed any scheme of government-dictated access which we consider "both practicable and desirable." We believe, to the contrary, that the public's interest in free expression through broadcasting will best be served and promoted through continued reliance on the fairness doctrine which leaves questions of access and the specific handling of public issues to the licensee's journalistic discretion. This system is far from perfect. However, in our judgment, it does represent the most appropriate accommodation of the various First Amendment interests involved, and provides for maximum public enlightenment on issues of significance with a minimum of governmental

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57. The FCC, pursuant to the authority conferred by Congress allocates frequencies to particular uses such as commercial, noncommercial public and educational, maritime and aeronautical, government and military, mobile industrial, and citizens' band. 47 U.S.C. § 303 (1970 & Supp. 1974). Such classification predetermines the character of broadcasts and excludes from the assigned frequencies all except the permitted class. However, as this is a reasonable and necessary system for the effective use of the broadcasting channels in the overall public interest, such regulation does not contravene freedom of speech or press.

58. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973).

59. As this article focuses on the fairness doctrine, the two other basic elements of the broadcaster's responsibility—equal opportunities in use of broadcasting facilities by political candidates and the ascertainment and fulfillment of the program needs of the community served—are not extensively discussed. For a more complete treatment of these additional responsibilities of broadcasters, see *Balanced Program Service in Television*, *supra* note 29; *Doctrines in Broadcasting*, *supra* note 35.

60. *Handling of Public Issues under the Fairness Doctrine*, 30 F.C.C.2d 26 (1971).

61. *Fairness Doctrine and Public Interest Standards*, *supra* note 1, at 26383.

intrusion into the journalistic process.<sup>62</sup>

Despite this contention, a practical right-of-access to broadcasting, in conformity with freedom of speech and press, can be devised. For example, Congress or the FCC could provide that a designated schedule of time periods be set aside for the discussion by citizens of public issues. The formats might include individual statements, debates, and panel discussions. Since broadcasting cannot accommodate all who wish to speak, and the need of the people to know is satisfied if everything worth saying is said, selection of subjects, speakers and formats would have to be entrusted to some authority. Such selection should not be entrusted to government, however, due to the danger of propagandizing. Nor is it necessary to leave the selection to the licensed broadcasters. At both the national and local levels such selection might be vested in a committee of citizens representative of the community involved. Each cognizable component of the community could choose through procedures of its preference its representation on the committee.<sup>63</sup> Whether such a practical right of access to broadcasting is a desirable addition to the fairness doctrine as developed by the FCC may be questioned by some. It may be argued, however, that such a committee system would have the merit of being sensitive to the need of the people to know. Also, it would implement the Supreme Court's determination that the interests of listeners and viewers are paramount among the various competing First Amendment interests in broadcasting.<sup>64</sup>

Some spokesmen for the broadcasting industry have long opposed the application of the fairness doctrine to that field.<sup>65</sup> Their objections were renewed during the FCC's recent hearing on the fairness doctrine.<sup>66</sup> The complaint is that requiring broadcasters to present con-

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62. *Id.*

63. For a proposal along these lines, see *Hearings on the Fairness Doctrine Before the Special Comm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., ser. 90-33, at 89, 92-93 (1968) (statement of Mrs. Harriet Pilpel, ACLU).

64. In the *Democratic National Committee* case, Chief Justice Burger was concerned that requiring broadcasters to accept paid editorial advertisements would favor the affluent in the determination of issues to be discussed. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 1, 123 (1973). To avoid such undue influence, the right-of-access should be without charge.

65. *Hearings on the Fairness Doctrine Before the Special Comm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., ser. 90-33, at 22-27 (Frank Stanton, CBS); at 39 (Elmer Lower, ABC); at 47-48 (Vincent T. Waslewski, NAB); at 77-83 (Reuven Frank, NBC); at 110-15 (Vincent T. Waslewski, NAB); at 145-51 (Jay Crouse, RTNDA) (1968).

66. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26374.

trasting viewpoints<sup>67</sup> inhibits broadcast journalism. This contention has been articulated by former chief justice of the California Supreme Court Roger J. Traynor, in his inimitable style, as follows:

The new twist in the [*Democratic National Committee*] case was the Court's concern over Red Lions, which, because of their own monstrous size, had been kept in captivity since infancy and now bleeped more than they roared. There were intimations that maybe even a firmly regulated old Red Lion should be trusted to exercise a little more freedom to make it a little more robust. Too many bleeps in the bellows and a lion loses its tone.<sup>68</sup>

However, statistics show that only about a tenth of licensed broadcasters feel inhibited by the fairness doctrine<sup>69</sup> and the objections typically come from officials of broadcasting organizations.<sup>70</sup> In its recent report on the fairness doctrine, the FCC stated, relative to the alleged inhibition of broadcasters by the fairness doctrine:

A number of commentators have argued that, in spite of its worthy purposes, the actual effect of the fairness doctrine can only be to restrict and inhibit broadcast journalism. Far from inhibiting debate, however, we believe that the doctrine has done much to expand and enrich it.<sup>71</sup>

The advertising function of broadcasting, not the fairness doctrine, puts bleeps in the bellows of the broadcasting lions. Commercial broadcasting is supported by advertising. Network managers, on behalf of mass-circulation advertisers and advertising agencies, provide programming which fulfills the advertising needs of mass-consumer-goods.<sup>72</sup> Entertainment programs are the most successful vehicles for attracting the largest audiences to hear the advertisements.<sup>73</sup> As one advertiser put it, "I want happy shows for happy people with happy problems."<sup>74</sup> Programs involving public issues simply do not attract the maximum audience and do not create an atmosphere which is condu-

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67. Some issues may have only two sides but others may involve a broad spectrum of differing viewpoints. For example, the issue of involvement in the Vietnamese War engendered at least four viewpoints: acceleration of military activity; holding military activity to the existing level; phased withdrawal; and immediate withdrawal. Note, *The FCC Fairness Doctrine and Informed Social Choice*, 8 HARV. J. LEGIS. 333, 351-52 (1971).

68. Traynor, *Speech Impediments and Hurricane Flo: The Implications of a Right-of-Reply to Newspapers*, 43 U. CIN. L. REV. 247, 263 (1974).

69. *Doctrines in Broadcasting*, *supra* note 35, at 480-81, 486-87.

70. See note 68 & accompanying text *supra*.

71. *Fairness Doctrine and Public Interest Standards*, *supra* note 1, at 26374.

72. *Balanced Program Service in Television*, *supra* note 29, at 634-44.

73. *Id.*

74. *Id.* at 637 n.14, quoting Transcript, *Hearings on Study of Radio and Television Network Broadcasting Before the FCC*, Docket No. 12782, 5557, 5588 (1959-1966).



cive to strong sales impact. Hence, Gresham's Law operates in broadcasting to drive out programs having significant minority audiences, such as public affairs programming, and to bring in programs attracting the maximum number of viewers, such as, in their day, "Gunsmoke" and "I Love Lucy."<sup>75</sup>

### Administration of the Fairness Doctrine in Broadcasting

The procedure through which the FCC administers the fairness doctrine is carefully designed to avoid inhibition of broadcasters' presentation of public issues.<sup>76</sup> Broadcasters are not required to present more than one side of a controversial issue in the same broadcast. Other points of view may be presented in the broadcaster's overall program service. Nor is equal balance of viewpoints required. Decisions as to the opposing views to be presented, the appropriate spokesmen, and the format are "left to the licensee's discretion subject only to a standard of reasonableness and good faith."<sup>77</sup> The FCC does not monitor broadcasts for possible violations, and only if the complaining party makes a prima facie case does the FCC forward the complaint to the broadcaster for comment.<sup>78</sup> In fiscal 1973, the FCC received about twenty-four hundred complaints of violation of the fairness doctrine, but only ninety-four of these complaints were forwarded to broadcasters for comments.<sup>79</sup> In the rare case in which the FCC finds that a broadcaster has not lived up to his responsibility under the fairness doctrine, the licensee is merely asked to provide reasonable time for the opposing point of view.<sup>80</sup>

A recent case, *National Broadcasting Co. v. FCC*,<sup>81</sup> decided by a divided federal court of appeals and recently set for rehearing en banc, indicates that the commission's scope of review of broadcasters' compliance with the fairness doctrine may be more limited than previously had been thought. A complaint had been made to the com-

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75. *Balanced Program Service in Television*, *supra* note 29, at 635.

76. A detailed description of the fairness doctrine and review of the FCC's adjudications thereunder do not serve the purpose of this article. Such accounts have been rendered elsewhere. See H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* (1973); *Doctrines in Broadcasting*, *supra* note 35.

77. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26374.

78. Complaints by Federation of Citizens Associations, 21 F.C.C.2d 12 (1969); Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26374.

79. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26375.

80. *Id.* at 26378.

81. 31 P & F RADIO REG. 2d 551 (D.C. Cir. 1974) rehearing granted, 87 BROADCASTING, Dec. 23, 1974, at 33.

mission that NBC's documentary, "Pensions: The Broken Promise,"<sup>82</sup> presented only one side of a controversial issue: the focus was on private pension plans which had failed and the need for reform, but inadequate attention was given to successful private pension plans.<sup>83</sup> NBC replied that the subject of the documentary was "some of the problems involved in some private pension plans" and that these problems were so well recognized that the documentary did not raise a controversial issue.<sup>84</sup>

The standard established by the commission governing broadcasters' compliance with the fairness doctrine is "reasonable, good faith judgments."<sup>85</sup> The FCC decided that the program "did in fact present viewpoints on one side of the overall performance and proposed regulation of the private pension system," and that this issue was a controversial one, and the commission ordered NBC to comply with the fairness doctrine.<sup>86</sup> However, the majority of the circuit court decided that the FCC had committed an error of law in defining the scope of the issue presented in the documentary differently and more comprehensively than NBC had defined it.<sup>87</sup> The court deemed the commission's substitution of its judgment for that of NBC concerning the character of the issue a departure from the commission's stated standard that broadcasters must exercise reasonable, good faith judgments.<sup>88</sup> The court stated that in the sensitive area of broadcast journalism the FCC's authority is limited to "correcting the licensee for abuse of discretion."<sup>89</sup> Having ruled that the commission's error was one of law, the court reversed.

In his dissent, Judge Tamm expressed concern that the restriction on the commission's review of broadcasters' performance under the fairness doctrine would permit licensees to propagandize listeners and viewers.<sup>90</sup> He observed that a documentary, unlike on-the-spot reporting, is well adapted to inclusion of contrasting viewpoints.<sup>91</sup> And he

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82. The script of the program is included in the opinion as Appendix A. *Id.* at 597-616.

83. *Id.* at 556.

84. *Id.* at 557.

85. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26376, 26378.

86. 31 P & F RADIO REG. 2d at 551, 558, *quoting* Accuracy in Media, Inc. v. National Broadcasting Co., 44 F.C.C.2d 1027 (1973).

87. 31 P & F RADIO REG. 2d at 570.

88. *Id.* at 570-71.

89. *Id.* at 574.

90. *Id.* at 594-96.

91. *Id.* at 594.

emphasized that the journalistic discretion of broadcasters to choose what may be heard or seen should not outweigh "the right of the people to know."<sup>92</sup>

The soundness of the holding in *National Broadcasting Co. v. FCC* is questionable and a reversal on en banc rehearing would be reasonable. The commission's determination that under the reasonable, good faith judgment test NBC should have recognized that the documentary raised a controversial issue and, thus, should have presented both sides, appears more appropriately classified as an issue of mixed fact and law rather than an issue of law.<sup>93</sup> The context seems appropriate for a reviewing court to exercise limited judicial review of the agency's conclusion rather than to substitute its judgment for that of the agency. Administrative agencies are entrusted by the Congress with responsibility for regulation in areas affected by a public interest.<sup>94</sup> The head of the agency is assisted by a career staff of experts. The agency is involved continuously in decisionmaking in a specialized area. Accordingly, the agency develops expertise in its area of responsibility. Reviewing courts, on the other hand, are responsible for the full spectrum of judicial problems and are not generally assisted by a substantial staff of experts. This contrast has prompted the Supreme Court to state: "So long as there is warrant in the record for the judgment of the expert body it must stand. . . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."<sup>95</sup>

Yet, reviewing courts do sometimes substitute judicial judgment for the administrative agency's judgment in what is clearly a mixed fact and law context. Professor Kenneth Davis has pointed out the difficulty in extracting the criteria which motivate the reviewing court, on the one hand, to classify a mixed law and fact context as one of fact and thus to apply limited judicial review or, on the other hand, to classify the context as one of law and substitute judicial judgment.<sup>96</sup> What motivated the court in *National Broadcasting Co. v. FCC* to substitute its judgment for that of the commission clearly was concern for freedom of journalistic discretion from governmental control. Thus, the court buttressed its position with the Supreme Court's view in the *Democratic National Committee* case that Congress had reposed substantial journal-

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92. *Id.*

93. *Id.* at 596.

94. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.01-07 (1958).

95. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145-46 (1939) (citations omitted).

96. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.05 (1958).

istic discretion in broadcasters.<sup>97</sup> The majority opinion states that "the risks of government interference are so oppressive as to require a plain showing of journalistic abuse before a government official can issue a direction that the journalist's report must be supplemented . . . ."<sup>98</sup>

Rather than attempting to do in the *Red Lion*, the court resorted to extracting some of its teeth. Although the opinion states that no First Amendment issue is reached,<sup>99</sup> it is consideration for journalistic discretion of the sort which is concerned in freedom of the press cases that appears to have prompted the reversal. The court turned the pyramid of judicial review of agency action on its apex, limiting the agency's review of the regulated industry's decisions and substituting judicial judgment for even this limited role of the agency. Yet, the Supreme Court's strong protection of journalistic discretion in *Democratic National Committee* augurs possible affirmance in the event of appeal to the Supreme Court. If the case is sustained, broadcasters will have even less reason than in the past for asserting that the fairness doctrine is inhibitory.

During the FCC's recent hearing on the fairness doctrine, some parties urged that the commission should not consider complaints at the time they are filed but should review them, together with the broadcaster's overall performance, at renewal time.<sup>100</sup> However, the FCC concluded that this procedure would not adequately safeguard the public's right to be informed.<sup>101</sup> If presentation of the opposing point of view is delayed until public opinion has crystallized, the fairness doctrine has no practical effect.<sup>102</sup>

### *The Case-by-Case Adjudication Policy*

In administering the fairness doctrine, the FCC has established general guidelines and has relied upon case-by-case adjudication rather than promulgation of extensive regulations.<sup>103</sup> The broadcaster is re-

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97. 31 P & F RADIO REG. 2d at 563.

98. *Id.* at 593. (Leventhal, J., supplemental concurring statement).

99. *Id.* at 558.

100. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26378.

101. *Id.*

102. *Doctrines in Broadcasting*, *supra* note 35, at 493-94.

103. Except for its rules on personal attacks and political editorials (see note 3 *supra*), the FCC has not issued regulations concerning application of the fairness doctrine. In 1964, the FCC issued a "primer" compiling significant adjudications on fairness complaints. FCC Public Notice of July 1, 1964, 29 Fed. Reg. 10415 (1964). The primer was reprinted in 1969. 40 F.C.C.2d 598. Another updating has been announced. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26379 n.18.

quired to provide a reasonable amount of time for programs on public issues. Thus the licensee has discretion in the first instance to determine the amount of time to be so allocated subject only to the test of reasonableness.<sup>104</sup> When a complaint is raised that the broadcaster has presented only one side of a specific issue, the FCC must make a three-fold determination: what specific issue has been raised; whether this is a controversial issue of public importance; and whether the broadcaster, in his overall programming, has afforded a reasonable opportunity for presentation of contrasting points of view.<sup>105</sup> The FCC has not developed criteria governing these determinations.<sup>106</sup> This policy is in keeping with the journalistic discretion reposed in the broadcaster.

The fairness doctrine applies to editorial comment in advertisements but does not apply to false or deceptive advertising.<sup>107</sup> In *Banzhaf v. FCC*,<sup>108</sup> the District of Columbia Circuit Court of Appeals upheld the FCC's application of the fairness doctrine to cigarette advertising, based on public health considerations<sup>109</sup> arising out of the surgeon general's determination that cigarette smoking is dangerous to health. The saturation advertising on television depicted smoking as essential to social prominence, distinction, or sexual attraction.<sup>110</sup> Once hooked, many youths are life-short customers.

In *Friends of the Earth v. FCC*,<sup>111</sup> the same circuit court held that the fairness doctrine could not logically be limited to cigarette advertising and that it might well apply to advertisement of high-powered automobiles and leaded gasoline. Nevertheless, in its recent report on the fairness doctrine the FCC concluded that cigarette advertising was a special health case and that the fairness doctrine should not otherwise hereafter apply to product advertising.<sup>112</sup> However, if a broadcaster

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104. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26375.

105. *Id.* at 26376-78.

106. Query whether broadcasters in small communities who typically lack substantial managerial staffs would be aided in complying with the fairness doctrine by the establishment of such criteria? For an incisive study of criteria for selecting issues which merit public airing, see Mayo, *The Free Forum—Development of a Democratic Forum in the Limited Media of Mass Communications*, 22 GEO. WASH. L. REV. 387 (1954).

107. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26380-82.

108. Complaint to WCBS-TV, 8 F.C.C.2d 381, *stay & reconsideration denied*, 9 F.C.C.2d 921 (1967), *aff'd sub nom.*, *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

109. WCBS-TV, 9 F.C.C.2d 921, 949 (1967).

110. FTC, REPORT TO CONGRESS ON THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT, 113 Cong. Rec. 2045, 2047-48 (1967).

111. 449 F.2d 1164 (D.C. Cir. 1971).

112. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26382. The FTC had proposed a right of access to respond to product advertising. *Id.*

accepts a product advertisement having editorial comment on a public issue, the fairness doctrine applies to the public issue.<sup>113</sup> In light of this policy and the Supreme Court's decision that there is no First Amendment right of access to broadcasting to present editorial advertisements,<sup>114</sup> advertisements containing editorial comment may be rejected by broadcasters.

Perhaps the most sensitive aspect of the fairness doctrine is accuracy of news reporting. As the news services of the three major television networks are the principal news source for most Americans, misstatement or suppression of the facts or essential elements of public issues could leave the public largely misinformed or uninformed. The network news services have been highly responsible in reporting the news. However, charges of slanting the news and falsification of facts are common.<sup>115</sup> The director of the Office of Telecommunications Policy, who is adviser to the president on communications, has recommended measures to exclude from news reporting alleged "ideological plugola," "elitist gossip," and "imbalance or consistent bias from the networks."<sup>116</sup>

Government must not be permitted to look over the shoulder of a news reporter as he writes his story, or to compare his first draft with his final product, or to inquire into those thoughts which occurred to the reporter's mind but, in the exercise of journalistic discretion, were omitted from the story. Such governmental supervision of journalism would strangle freedom of the press. Thus, when a congressional committee investigated charges that CBS had deleted and rearranged materials in its documentary "The Selling of the Pentagon" so as to create a false impression<sup>117</sup> the committee subpoenaed the film's omissions. However, the House very appropriately refused to issue a contempt citation against CBS president Frank Stanton for failure to comply with the subpoena.

The FCC has also refused to engage in any such supervision of broadcast journalism. In its recent report on the fairness doctrine, the FCC adhered to its prior policy of refusing to investigate charges of misrepresentation of the news unless, on the face of the evidence sub-

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113. *Id.* at 26380.

114. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

115. See note 7 *supra*.

116. Address by Clay T. Whitehead, Director of the Office of Telecommunication Policy in Indianapolis, Ind., Dec. 18, 1972.

117. H.R. REP. NO. 92-349, 92d Cong., 1st Sess. (1971).

mitted, there is substantial indication of "deliberate distortion."<sup>118</sup>

### The Argument for Abandoning the Fairness Doctrine

A respected segment of opinion continues to urge that the fairness doctrine should be abandoned. A conference conducted in 1973 by the Center for the Study of Democratic Institutions recommended that in lieu of the fairness doctrine, freedom and responsibility in broadcast journalism should be sought through the private National News Council.<sup>119</sup> The council, whose founding chairman was Roger J. Traynor, the retired chief justice of the Supreme Court of California, has rendered significant service but has obvious limitations. The council hears complaints by and against the media; however, it lacks subpoena power and must depend upon cooperation. Some major newspapers, deeming the council an unwarranted intrusion into journalism, have refused this needed cooperation. Particularly in broadcasting, where the impact of the advertising function on programming is great and the political process has its major forum, it is unlikely that a council of private citizens can assure equal opportunity in use of broadcasting for campaign purposes, fairness in the presentation of all sides of vital issues, and fulfillment of the community's program needs. The council is a useful adjunct to the fairness doctrine but should not and could not supplant it.

In 1973 another conference, convened by the American Trial Lawyers Foundation, concluded that all regulation of broadcasting program service,<sup>120</sup> including the fairness doctrine, should be abandoned.<sup>121</sup> The majority at the conference took the position that:

[t]he right of free expression [via broadcasting] is that of the station owners, who are licensed to use the airwaves as newspaper publishers receive special permits for reduced rate use of the mails.<sup>122</sup>

Such a contention is diametrically opposed to the Supreme Court's established principle that, in the accommodation of First Amendment rights in broadcasting, the right of the listeners and viewers is paramount.<sup>123</sup> Furthermore, equating the licensing of broadcasters with

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118. Fairness Doctrine and Public Interest Standards, *supra* note 1, at 26380; Complaint concerning "The Selling of the Pentagon," 30 F.C.C.2d 150 (1971).

119. ASHMORE, *supra* note 7, at chs. 7 & 8.

120. ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, AMERICAN TRIAL LAWYERS FOUNDATION, THE FIRST AMENDMENT AND THE NEWS MEDIA—FINAL REPORT 21-22 (1973).

121. *Id.* at 23 (Commentary on Broadcast Journalism).

122. *Id.* at 26.

123. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

the grant of reduced mail rates to the print media casts an air of unreality over the conference proceedings and report. Thus, Professor Thomas I. Emerson, one of the dissenters from the conference's conclusions, stated:

I strongly dissent from [the recommendation] to "deregulate" the radio and television media. The stated purpose is to create "freedom for each and every form and portion of the media to choose the mode and content of *its own expression*." In my judgment this approach embodies a very limited view of the real impact of total decontrol upon the system of free expression in this country. There is no assurance whatever that abandonment of the Fairness Doctrine, of the rules for encouraging diversification in programming, or of similar FCC requirements would result in greater diversity of expression or increased access for persons wishing to use the broadcast media. On the contrary, the result would only be to assure a continuing monopoly of expression to existing owners and operators of the broadcasting facilities.<sup>124</sup>

In 1971 the Office of Telecommunications Policy, which advises the president on communications, recommended that AM and FM radio be deregulated and that experimental deregulation of one or two stations, including the suspension of the fairness doctrine, be conducted.<sup>125</sup> The FCC has undertaken such an experiment.<sup>126</sup> However, a limited experiment in deregulation of radio is unlikely to lay an objective basis for evaluation of the need to continue the fairness doctrine. Broadcasters' programming judgments in such a limited experiment may be influenced by their status as "silent trustees" of the broadcasting industry's interest in future deregulation.

### The Fairness Doctrine: Protecting the Need to Know

In broadcasting Congress and the FCC have converted the people's need to know into a right to know by applying the fairness doctrine. The Supreme Court has determined that the interest of listeners and viewers is paramount among the various First Amendment interests involved, and hence, that the fairness doctrine does not violate the broadcasters' freedom of press. Like most doctrines, the fairness

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124. ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, AMERICAN TRIAL LAWYERS FOUNDATION, THE FIRST AMENDMENT AND THE NEWS MEDIA—FINAL REPORT 30 (1973).

125. OFFICE OF TELECOMMUNICATIONS POLICY, THE REGULATION OF COMMERCIAL RADIO STATIONS (1971); *Hearings on Overview of the Office of Telecommunications Policy Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess., ser. 93-2, at 9 (1973).

126. FCC, Broadcast Regulation Study, Apr. 6, 1972.



doctrine is subject to improvement.<sup>127</sup> However, the conclusion of some well-meaning citizens that broadcasting should be deregulated is based on the unsound premise that if broadcasting is free of governmental regulation it will be in a better position to prevent thought control by government.<sup>128</sup>

The ability of the medium to keep a watchful eye on government is not diminished by requiring broadcasters to observe the fairness doctrine. Rather, the requirement that broadcasters allocate reasonable time to public issues and present contrasting viewpoints on such issues creates a salubrious journalistic environment. In carrying out their journalistic responsibility, broadcasters often ferret out conduct of government officials in concealing activities, issuing incomplete, misleading, or false statements, or propagandizing. It is noteworthy that the actions during the Nixon administration deemed repressive of the media,<sup>129</sup> which prompted some citizens to urge deregulation of broadcasting, were exposed by broadcasting as well as print media.

If the limited regulation of journalistic responsibility under the fairness doctrine were abandoned, it is likely that the issues ventilated and points of view aired would be more representative of the interests of broadcasting owners and managers than of the public's interest. The very development of chains of stations, with concentration of control of program content, which motivated Congress to regulate broadcasting in the first instance, lends credence to the threat of potential control of public opinion and the political process by broadcasters unrestrained by the fairness doctrine. In our representative democracy, the need of the people to know should continue to be a right to know. Congress and the FCC, accordingly, should retain the fairness doctrine, and the FCC's strong reemphasis of the doctrine's importance and practicality in its most recent policy statement regarding the doctrine<sup>130</sup> augurs its continuation in radio and television for the foreseeable future.

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127. For a suggested practical system of citizen access and criteria for selecting vital issues for broadcast, see text accompanying notes 62-64 *supra*. See also H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING passim* (1973); *Doctrines in Broadcasting*, *supra* note 35, at 542-44.

128. For example, Ashmore's report on the conference conducted by the Center for Study of Democratic Institutions, as the title *Fear in the Air* indicates, describes Nixon administration actions deemed repressive of the media, and asserts that the gains from media freedom outweigh any losses from media irresponsibility resulting from deregulation. ASHMORE, *supra* note 7.

129. See note 7 & accompanying text *supra*.

130. Fairness Doctrine and Public Interest Standards, *supra* note 1,

## The Print Media's Freedom from the Fairness Doctrine

### Tornillo: Free Press versus Right to Reply

In *Miami Herald Publishing Co. v. Tornillo*,<sup>131</sup> the United States Supreme Court, reversing the Supreme Court of Florida, held that Florida's statute<sup>132</sup> giving a political candidate whose personal character is attacked during a campaign a right of reply was an unconstitutional violation of freedom of the press. The Florida Supreme Court, emphasizing the people's need to know, had found that free speech was enhanced rather than abridged by the statute and had held that the statute did not violate the First Amendment.<sup>133</sup> The Florida court reasoned:

Recognizing that there is a right to publish without prior governmental restraint, we also emphasize that there is a correlative responsibility that the public be fully informed. . . .

The public "need to know" is most critical during an election campaign. . . .

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. . . .

Freedom of expression was retained by the people through the First Amendment for all the people and not merely for a select few. The First Amendment did not create a privileged class which through a monopoly of instruments of the newspaper industry would be able to deny to the people the freedom of expression which the First Amendment guarantees.<sup>134</sup>

The Florida Supreme Court thus balanced the First Amendment interests of publishers, candidates, and readers, much as the United States Supreme Court had balanced the interests of broadcasters, those seeking access to broadcasting, and listeners and viewers in the *Red Lion* case.<sup>135</sup> In upholding the constitutionality of the application of the fair-

131. 94 S. Ct. 2831 (1974).

132. Florida Statutes Annotated section 104.38 provides: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083." FLA. STAT. ANN. § 104.38 (1973).

133. 287 So. 2d 78 (Fla. 1973).

134. *Id.* at 80, 82-83 (footnote omitted) (emphasis in original deleted).

135. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

ness doctrine to broadcasting, the *Red Lion* court declared the interest of the listeners and viewers "paramount"; similarly, the Florida tribunal gave greater weight to the need of the electorate for objective information regarding the qualifications of political candidates. Yet in reversing the Florida decision, the United States Supreme Court refused to apply to the print media the concept of accommodation of First Amendment interests which it had applied to broadcasting. Rather, the Court considered solely the effect of the right-to-reply statute on the right of publishers to determine what they will print:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.<sup>136</sup>

It may be noted that Justices Brennan and Rehnquist, while concurring, reserved judgment on whether a statute requiring print media to retract defamatory falsehoods would violate the First Amendment.<sup>137</sup> If such a retraction can validly be required, the journalistic freedom of the print media is not absolute, contrary to what the majority opinion indicates.

### The Numbers Game: Systems Limitations in Broadcasting and Print

The Supreme Court's approach to the fairness doctrine in broadcasting<sup>138</sup> and the prohibition of the right-to-reply statute in print media can be reconciled on the ground of the natural limitation of the broadcasting spectrum and the lack of such limitation on the number of print media. As noted previously, the Court relied substantially on the scarcity of broadcasting channels to sustain the constitutionality of the application of the fairness doctrine to broadcasting in the *Red Lion* case.<sup>139</sup>

However, economic limitations on the print media have resulted in concentration of control similar to that existing in broadcasting at the local level. In 1972, there were 8,253 broadcasting stations and only

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136. 94 S. Ct. at 2839-40 (footnote omitted).

137. *Id.* at 2840.

138. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

139. *Id.* at 399-401. See text accompanying note 48 *supra*.

1,728 daily newspapers.<sup>140</sup> Moreover, competing daily newspapers are rare. In 1967, the concentration of daily newspaper ownership was as follows:<sup>141</sup> in only 3 American cities—Boston, New York, and Washington—did more than 2 daily newspaper ownerships compete. In only 64 cities were there 2 daily newspapers held by two different owners. In 141 cities there were 2 daily newspapers under the same ownership. In only twenty-six states was there more than 1 city in which daily newspapers competed; in seventeen states there were no daily competing newspapers. In 23 cities, daily newspaper were published under joint operating agreements. One-half of the daily newspapers were owned by chains, and their circulation was 62 percent of the total daily newspaper circulation. The concentration was aggravated by the common ownership of several daily newspapers and several broadcasting stations. In addition, nationally syndicated columnists contributed to the homogeneity of editorial opinion.

The high concentration of ownership of the print media was a strong factor in the Florida Supreme Court's decision that the right-to-reply statute did not violate the First Amendment. On this point, the court stated:

Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country.<sup>142</sup>

The court noted that the *Miami Herald* is the largest newspaper published in the state, and is "not only a large city daily newspaper but also is a regional and international newspaper."<sup>143</sup> A personal attack on a political candidate by the most important newspaper in an area of heavy concentration of newspaper ownership may seriously impede the opportunity of the electorate to reach an informed opinion on the qualifications of the opposing candidates.

Our constitutional fathers wrote the First Amendment guarantees of freedom of speech and press in the period of Tom Paine. Dick and Harry did not need access to Tom's penny sheet because they could set up a printing press in the basement and print their own sheet. Today, however, newspapers are big business. Concentration has largely

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140. 1973 BROADCASTING YEARBOOK 12; NEWSPAPER ENTERPRISE ASS'N, WORLD ALMANAC AND BOOK OF FACTS 323 (1974).

141. For substantiation of the data in the text, see B. RUCKER, *THE FIRST FREEDOM* (1968), reviewed by Barrow, 15 N.Y.L.F. 999 (1969).

142. *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78, 83 (Fla. 1973).

143. *Id.*

removed competition. In general, the editorial policies of the print media represent the interests of the owners. Of course, reporters usually have a large measure of independence. But in the important areas of political elections and opinion on vital issues the owners exercise control. The capital required to publish modern newspapers means that the owners are in the wealthy end of the economic scale. Those who commit their wealth to newspaper communications are interested in shaping public opinion and in aiding the election of candidates of their choice. For example, in the ten-day period preceding an election, it is common practice for a newspaper to run in a favored location in the paper for several consecutive days the list of candidates which the newspaper recommends for election. Editorial opinion favors some candidates, opposes others, and presents the owner's point of view on the issues in the election. In Tom Paine's time a variety of viewpoints found outlets through the many penny sheets. Today in the time of Hearst, Scripps-Howard, Knight, and other newspaper chains, the number of viewpoints printed is limited, and the scope is not representative of the whole society.

### Press Freedom Under the Law of Defamation

The impact of the *Tornillo* case in denying the need of the people to know is aggravated by the law of defamation. In *New York Times Co. v. Sullivan*,<sup>144</sup> the Supreme Court held that if a public official or public figure were defamed by a newspaper, the defamed person could recover damages for defamation only if he could prove that publication of the defamatory falsehood was "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>145</sup> In *Rosenbloom v. Metromedia, Inc.*,<sup>146</sup> the Supreme Court extended this standard to defamatory falsehood occurring in the context of "all discussion and communication involving matters of public or general concern."<sup>147</sup>

On the same day that it decided the *Tornillo* case, the Supreme Court ruled in *Gertz v. Robert Welch, Inc.*<sup>148</sup> that a newspaper which publishes defamatory falsehoods about an individual who is neither a public official nor a public figure has no constitutional privilege against

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144. 376 U.S. 254 (1964).

145. *Id.* at 279-80. The extension of the doctrine to public figures was made in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

146. 403 U.S. 29 (1971).

147. *Id.* at 44.

148. 94 S. Ct. 2997 (1974).

liability, even if the falsehoods were published in a discussion of a matter of public interest. However, the Court further stated that proof of failure to investigate the matter stated falsely does not establish "actual malice" and held that, unless actual malice is proved, recovery is limited to damages for the actual injury shown.<sup>149</sup>

Possibly the majority of the Court thought that the *Gertz* decision would reduce the impact of *Tornillo* on individuals who are not public officials or public figures. While declaring that a right-of-reply statute applicable to *political candidates* violates freedom of the press, *Tornillo* renders any future right-of-reply statute by *private individuals* a fortiori an infringement of freedom of the press. Concurring in *Tornillo*, Mr. Justice White—one of the four dissenters in *Gertz*—complained that the Court had not forged the correct balance in the two cases, stating:

To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.<sup>150</sup>

However, even an appropriate balance between press freedom and remedy for the defamed person does not reach the greater harm which is done by defamation of a political candidate or a representative of a viewpoint on a controversial issue of public importance. The cap-sheaf on the scale of societal values is the political process. If the most meritorious candidate loses because he was falsely defamed, or if a meritorious issue submitted to the electorate in a referendum loses because spokesmen for it are falsely defamed, the greatest loss is the public's, through the misleading of the electorate to an unwise choice. The *Tornillo* case, coupled with the defamation law following *New York Times*, leaves both the person attacked and, more importantly, the electorate, in the words of Mr. Justice White, "at the complete mercy of the press."<sup>151</sup>

A free trade in ideas disciplined by the competition of the market, envisioned by Mr. Justice Holmes,<sup>152</sup> does not exist today. The economic factors which have driven many newspapers from the market

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149. *Id.* at 3003, 3012.

150. 94 S. Ct. 2831, 2842 (1974); cf. *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997, 3038 (1974) (White, J., dissenting).

151. 94 S. Ct. at 2842.

152. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion). See text accompanying note 24 *supra*.

practically exclude new entry.<sup>153</sup> Professor Jerome Barron, in view of these circumstances, has advocated a constitutional right of access to newspapers for confrontation of ideas.<sup>154</sup> Professor Zachariah Chafee, Jr., discussing the relationship between the government and the press, noted:

The mere absence of governmental restrictions will not make newspapers and other instrumentalities of communication play their proper part in the kind of society we desire. In addition, affirmative action must be taken either by the government or by other persons with power to influence methods and content.<sup>155</sup>

Nevertheless, Professor Chafee saw danger in "letting the camel's nose into the tent" of the press<sup>156</sup> and warned:

[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?<sup>157</sup>

Professor Thomas I. Emerson recognizes that "a limited right of access to the press can be safely enforced."<sup>158</sup> Professor Emerson approaches the First Amendment problem in terms of balancing diversity of viewpoints against interference with journalistic discretion:

The right of reply to libelous matter, and perhaps the right to buy noncommercial advertising space, could be imposed by judicial action, were a court disposed to do so. The other rights of access would almost certainly have to be established in the first instance by legislative action. More important for First Amendment purposes, however, would be the nature of the administrative machinery necessary to enforce the various kinds of controls effectively. The first two categories—the noncommercial advertisements and the reply to libel or personal attack—could be phrased in precise terms and readily administered through the usual forms of judicial process . . . . The obligation to print statements, on the other hand, would raise intricate problems . . . . The "fairness doctrine" would be even more complex to administer. It is

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153. The economic facts of life with regard to failing newspapers prompted Congress to except joint publishing operations from the antitrust laws. Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1974).

154. FREEDOM FOR WHOM?, *supra* note 25. Professor Barron was counsel for Tornillo in the *Miami Herald* case. His position that there is a constitutional right of access for the confrontation of ideas was, of course, rejected in *Miami Herald*.

155. CHAFEE, *supra* note 19, at 471.

156. *Id.* at 709.

157. *Id.* at 633.

158. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 671 (1970).

likely that these two latter categories could be enforced, if at all, only through some form of administrative tribunal.

If we apply to this situation the two tests set forth above, which limit the power of government to promote the system of freedom of expression by control of the mass media, the first two forms of regulation might be found valid and the second two invalid under the First Amendment. In their substantive impact the first two regulations would increase the number of participants and produce greater diversity; they would not seem to entail any serious adverse effect upon the newspaper and the need to know.<sup>159</sup>

### **Tornillo and the Need to Know**

Our First Amendment concerns have grown greatly since the constitutional fathers first adopted the guarantee of freedom of speech and press.<sup>160</sup> Nevertheless, it is questionable that any of these concerns is threatened by a right-to-reply statute such as was involved in the *Tornillo* case. The need of the people to know is clear.

Unless they are informed, our citizens give up the effort to understand our problems and withdraw from the decisionmaking forum.<sup>161</sup> Our laws can encourage or discourage their participation. All our law, constitutional law or otherwise, has its foundation in societal values. Certainly, the capsheaf of these values is informed participation by the people in the sound decision of our political and other vital issues. This highest priority in our societal values was at stake in the *Tornillo* case. The Supreme Court's decision will permit a newspaper to misinform the electorate by attacking the character of one candidate while praising

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159. *Id.* at 670-71. Of course, the Supreme Court in the *Miami Herald* case has taken the position that government cannot require newspapers to print an editorial message of any kind. In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), the Court upheld, against attack on freedom of the press grounds, an ordinance which forbade newspapers from placing job advertisements in separate male and female categories. However, the Court has long recognized that commercial advertising does not merit the First Amendment protection accorded printed matter containing noncommercial ideas. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

160. *Hearings on Freedom of the Press Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st & 2d Sess., at 175 (1972) (statement of Prof. L. Levy).

161. Justice Frankfurter wrote:

"In the years between the wars few things were more disturbing than the number of citizens who gave up the effort to understand our problems. . . . Education means the power to reduce the number of citizens who give up the effort of disinterested and responsible understanding. . . . For where the effort is made, there citizens are found; and where citizens are found, responsibility is squarely forced upon a statesman to explain, if need be to justify, the policy he proposes." Frankfurter, *There Is No Middle Way*, *SATURDAY REV. OF LITERATURE*, Oct. 26, 1946, at 21, quoted in *CHAFEE*, *supra* note 19, at 753.



his opponent. Such attacks typically occur near the end of a political campaign, and the citizen thus goes to the polls without having had an opportunity to ascertain the truth. Elections may be decided by citizens voting contrary to the way they would have voted had they not been misinformed. Certainly, if there is a practical way to clear the air of false, personal attacks on candidates without interfering with the journalistic discretion of the newspaper, it should not fall afoul of the First Amendment to require a newspaper to carry a correction or even to permit the maligned candidate to reply.

There is such a practical way to administer charges by candidates that a newspaper has attacked their character in a manner which may confuse the voters and lead to a nonobjective choice at the polls. A representative committee of citizens, chosen by such procedure as the community may prefer, could examine such charges by a candidate against a local newspaper and determine whether a right of reply was justified in the particular case. It is unlikely that such a procedure would overburden the newspapers with demands for column space. If, in the stringent financial circumstances of newspapers, the allocation of columns for the right of reply should prove to be an economic burden, government might well grant a subsidy to the local committee for payment for the columns so used.<sup>162</sup>

The notion of subsidy arouses fears of government domination of the press. However, the payment could be in the form of a "hand out" to the committee, without government power to dictate the committee's choice of replies to be published or the newspaper's exercise of journalistic discretion. Indeed, the committee might select appropriate writers on neglected issues for publication in subsidized columns without involving the complicated administrative machinery or interfering with the operation of the newspaper.

The *Tornillo* case precludes enforced access to newspapers by a representative committee of private citizens either replying to personal attacks against political candidates or merely presenting neglected issues. Hence, any plan of better fulfilling the need of the people to know through the print media can be achieved only through the voluntary cooperation of newspapers. Such cooperation is already present to some extent; for example, newspapers typically carry a substantial number of letters from their readers, and these are usually chosen to

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162. Any such procedure should be limited to daily newspapers, and possibly national news weeklies with major circulation, as these have the most significant impact on the political process and public opinion.

reflect varying viewpoints on significant issues. Further, the *New York Times*, the *Washington Post*, and a few other newspapers have adopted a practice of including on their "op-ed" (opposite editorial) page columns by persons representing a broad spectrum of opinion.

In such newspapers, freedom of the print media is accompanied by a high degree of journalistic responsibility. Nevertheless, more could and should be done. A political candidate or other citizen who is personally attacked or falsely defamed by a newspaper should be given, voluntarily, an opportunity to reply. If there is substantial complaint that a newspaper is presenting only one point of view on an important public issue, or is neglecting any side of such issue, the newspaper should likewise voluntarily provide space for the airing of such other views. The newspaper might well voluntarily invite the community which it serves to establish a representative committee to administer the selection of issues for airing and spokesmen for the viewpoints to be presented. In addition, such a committee might be given responsibility for determining whether a person claiming that he has been personally attacked or falsely defamed has sufficient merit to his case to justify the newspaper's voluntarily granting a right of reply. Such voluntary adoption of a policy of access to newspapers would serve as a benchmark of journalistic responsibility and avoid the necessity for any future reexamination of the journalistic freedom assured to newspapers by the *Tornillo* doctrine.<sup>163</sup>

### The Fairness Doctrine in Cable Television

The FCC has applied the fairness doctrine and companion equal opportunities in political broadcasting doctrine to cable television in the same manner that the doctrines are applied to broadcasting.<sup>164</sup> Moreover, cable television operators are required to provide public access channels for the purposes of government, education and discussion of public issues and to originate programming.<sup>165</sup> In May of 1974 the

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163. Some of the major newspapers have refused to cooperate with the National News Council's efforts involving complaints against the media. See text accompanying note 119 *supra*. Although the purpose of the council is to protect the news media from greater intrusion by government, the print media, accustomed to a complete freedom from regulation which is not accorded to the electronic media, may well reject any such suggestions for greater voluntary journalistic responsibility. Such a course, if it should lead to substantial harm to the electorate and political candidates, could force a reopening of the question of balance of freedom and responsibility in the print media.

164. 47 C.F.R. §§ 76.205, .209 (1973).

165. *Id.* §§ 76.201-.251.

FCC announced that its cable television rules,<sup>166</sup> which were adopted only two years earlier, will be reviewed in the light of experience under the rules to determine whether they should be changed.<sup>167</sup> In such review, it is anticipated that issues will include whether the fairness doctrine, the companion equal opportunities in political broadcasting doctrine, and the program origination and public access requirements should continue to be applied to cable television.

Society has been thrust to the threshold of a communications revolution by the development of cable television and its information and entertainment capacities.<sup>168</sup> When fully developed, cable television will change our social, professional and commercial life as nothing has since the printing press.<sup>169</sup> Cable television has the potential to provide the individual with a complete information environment by linking data storage and retrieval mechanisms, computers, facsimile devices,

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166. The rules and the FCC's covering opinion are published in the Federal Register. 37 Fed. Reg. 3252-341 (1972). The rules are codified at 47 C.F.R. §§ 76.1-617 (1973). For an analysis of the rules, see Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 VAND. L. REV. 681 (1972).

167. FCC Cable Television Re-Regulation Study, Public Notice No. G 21786 (May 15, 1974).

168. For a description of the technology, see sources cited note 14, *supra*. See also W. BAER, CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING (1973) [hereinafter cited as BAER].

169. Present cable television service consists largely of television programs captured from the air and distributed via cable to subscribers. However, when cable television achieves heavy penetration of homes and offices it will be economically feasible to provide many new services, the technology for which is already available and some of which are already in use in point to point systems. As the income from cable operations is not limited to advertising but includes subscription fees and leased cable rental fees, the advertisers' cost-per-thousand viewers standard, which determines the character of commercial broadcasting's programming, need not have such great impact on cable television's service. Thus, it is practical to provide needed program service to special groups such as children, the aged, gardening enthusiasts, minorities, underprivileged, and the like. Public information channels can provide information and counseling regarding employment, welfare and health services. Doctors can transmit medical diagnostical materials, such as cardiograms, to special clinics and consult by two way communication. Lawyers can retrieve from data banks the precedents applicable to their cases. Businessmen can negotiate by two way video and save time lost in travel. Merchants can display goods by cable, and the housewife can shop without going to the store. Banking can be handled by two way cable response. Scholars can conduct raw research by retrieving information stored in data banks, thus saving time for evaluation and judgment. Educational television can increase the variety of services through cable television. The universities can deliver higher education to the home through two way communication. Mortgages and other security interests, subject to public notice filing, can be recorded and searched through data storage and retrieval. Traffic can be expedited through cable television supervision. The foregoing examples are only a few illustrations of applications of the existing and potential cable television technology. The applications are limited only by economics, imagination and will.

space satellites, and other communications technology to television sets, radio receivers, and other terminals in the individual's home. Cable television provides further possibility for profound change through its potential for two-way communication—digitally, vocally, and, when the economic cost is reduced by mass use, visually. The individual need no longer be a passive recipient of information chosen and transmitted by others. With the aid of cable television, he can select from the mass of information and entertainment stored in data banks and computer centers that which fulfills his needs, tastes, or desires.

The greatest implication of the electronic communications revolution represented by cable television, however, is the opportunity for the individual to participate in decisionmaking. The individual has been substantially isolated from the decisionmaking process. As our problems grow more complex and time for decision shortens, decisionmaking is vested more and more in an elite. With wise use, the new communications technology will encourage the individual to participate in the decision of public issues. Preference polling on political matters will be feasible. An informational base can be laid for enlightened participation and consent by the people in self-government. Consensus and support for the solutions will then be possible. Through cable television the town meeting of our early history can be restored at the local level and established at the state and national levels. Such a potential national town meeting provides another opportunity to win the race between education and catastrophe. But will our policy makers take advantage of this opportunity? Some welcome broad participation by our citizens in self-government; many fear such a development. In varying degree, the Hamiltonian-Jeffersonian conflict<sup>170</sup> has continued throughout our history. Whether the electronic communications revolution is to be used to restore the individual to a responsible role in decisionmaking or is to be limited to serving commercial, professional, and entertainment needs is a policy decision now in the making.

### **Communications Common Carriers and the First Amendment Balance**

The First Amendment interests to be accommodated in the communications media are affected by the character of the media. The print media are typical private free enterprises. Telephone, telegraph and transoceanic cable are common carriers. Broadcasting and cable television occupy a position between these poles, with characteristics of each.

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170. See text accompanying notes 11-12 *supra*.

In the regulation of communications common carriers, Congress authorized the FCC to require access upon reasonable request, to set just and reasonable rates, and to assure uniform treatment of members of each class of users.<sup>171</sup> Common carriers are granted monopoly status because competition in the areas of service involved is wasteful. Regulation is substituted for competition to assure service in the public interest. The communications common carriers do not editorialize or originate programming and do not provide a forum for political appearances or discussion of public issues. Hence, there exists no First Amendment interest of the communications common carrier to be accommodated with the interests of others.

In the Communications Act of 1934, Congress declared that broadcasters are not common carriers,<sup>172</sup> and the Supreme Court has observed that, as to broadcasting, "Congress has not, in its regulatory scheme, abandoned the principle of free competition . . . ."<sup>173</sup> Broadcasters' rates are not controlled by the FCC and anticompetitive practices are prohibited.<sup>174</sup> Yet, broadcasters are licensed and their program service is regulated in the public interest. As discussed earlier,<sup>175</sup> requiring licensed broadcasters to allocate reasonable time for the presentation of public issues and viewpoints on these issues does not violate the freedom of the press of broadcasters. Also, as noted above,<sup>176</sup> just as the FCC's determination that broadcasters are not required to grant access to parties desiring to present editorial advertisements does not violate the freedom of speech of such parties, if the FCC should devise a practical plan of access for such editorial advertisements and compel broadcaster compliance, this requirement would not violate the broadcasters' freedom of the press.

Broadcasting thus occupies a place in the regulatory framework between typical free enterprise and communications common carriers. The broadcaster has First Amendment interests because he editorializes and represents a viewpoint on public issues. But the broadcaster's interests must be accommodated with the First Amendment interests of networks, independent program producers, persons seeking access

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171. 47 U.S.C. §§ 201-02 (1970).

172. *Id.* § 153(h).

173. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940). The anti-trust laws apply to broadcasting. 47 U.S.C. §§ 313-14 (1970). The Department of Justice has primary jurisdiction in antitrust actions against broadcasters. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

174. 47 U.S.C. §§ 301, 303, 307 (1970).

175. See text accompanying notes 45-57 *supra*.

176. See text accompanying notes 57-64 *supra*.

to the publicly owned airwaves, and, most importantly, the interest of listeners and viewers, which the Supreme Court has deemed "paramount" among the various First Amendment interests involved.<sup>177</sup> Thus, as discussed earlier, the complex issues of freedom of speech and press have, in the broadcasting field, been resolved in favor of the constitutionality of regulation.<sup>178</sup>

Cable television occupies a position somewhere between broadcasting and communications common carriers. If cable television were a communications common carrier, like telegraph, telephone, and trans-oceanic cable, the FCC could exercise pervasive regulation of rates, access and service without raising an issue of the freedom of press of cable operators. However, the FCC, in its regulation of cable television, has impressed upon that medium a *sui generis* character. Like broadcasters, cable operators are required by the commission to comply with the fairness doctrine and the equal opportunities in political broadcasting doctrine.<sup>179</sup> Moreover, cable operators must provide free public access channels<sup>180</sup> and originate programming.<sup>181</sup> These requirements are of the same character as those impressed upon broadcasting. On the other hand, several requirements imposed by the FCC on cable operators partake of the character of regulations governing communications common carriers. Leased channels must be offered on a nondiscriminatory basis.<sup>182</sup> The local franchising authority is delegated power to regulate the fees charged to subscribers.<sup>183</sup> Although the rates charged to lessees of channels<sup>184</sup> and advertisers<sup>185</sup> are not regulated, the technical standards of cable television equipment, like communications common carrier equipment, are regulated.<sup>186</sup> Thus, cable television, which is neither a common carrier<sup>187</sup> nor a typical free enter-

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177. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

178. *Id.*; *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

179. See note 164 & accompanying text *supra*.

180. See note 165 & accompanying text *supra*.

181. 47 C.F.R. § 76.201 (1973). During the litigation in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), the FCC suspended the program origination rule. Although the Supreme Court in that case sustained the jurisdiction and authority of the FCC to promulgate the rule, the FCC has not been able to muster a majority vote to lift its suspension.

182. 47 C.F.R. §§ 76.251(a)(7), (11)(iii) (1973).

183. *Id.* § 76.31(a)(4).

184. *Id.* § 76.251(a)(11)(iii).

185. *Cf. id.* § 76.217.

186. *Id.* § 76.251.

187. Initially the FCC denied that it had jurisdiction of cable television on the ground that it was not a common carrier. *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958). The broadcasting industry prevailed on the FCC to reconsider the

prise, is regulated to a greater extent than broadcasting but less than common carriers.

### The First Amendment Issues in Cable Television

In view of the above-described characteristics of cable television, it is surprising that issues of freedom of speech and press have not arisen in cable television as they have in broadcasting. The explanation may lie in the fact that because cable television resembles communications common carriers more than broadcasting does and, as regulation of broadcasting has been held compatible with the First Amendment, a fortiori similar regulation of cable television would be constitutional.

The broadcasting regulations which apply to cable television and which have raised the strongest issues of freedom of speech and press are the fairness doctrine, the equal opportunities in political broadcasting doctrine, and the requirement of diversity in program service. As observed in the earlier discussion of the *Red Lion* case,<sup>188</sup> the Supreme Court sustained the constitutionality of the fairness doctrine in broadcasting against attack on the ground of freedom of speech and press. Mr. Justice White's opinion makes clear that the companion equal opportunities in political broadcasting doctrine also conforms with the First Amendment.<sup>189</sup> As the First Amendment interest of cable operators is no greater—if as great—as that of broadcasters, it may be confidently predicted that the Supreme Court would sustain the application of the fairness doctrine and the equal opportunities in political broadcasting doctrine to cable operators.

Similarly, it would seem that the requirement that cable operators provide free public access channels would be sustained against any attack on First Amendment grounds. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,<sup>190</sup> Chief Justice Burger stated

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issue of jurisdiction of cable television. Again the FCC denied that it had jurisdiction, stating: "In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise." CATV AND TV REPEATER SERVICES REPORT, 26 F.C.C. 403, 431 (1959). The FCC later changed its position and asserted jurisdiction. See note 201 *infra*. Judicial support for the proposition that cable television is not a common carrier is found in *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966).

188. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). See text accompanying notes 45-53 *supra*.

189. 395 U.S. at 391.

190. 412 U.S. 94 (1973). See note 55 *supra*.

that if the FCC should devise a practical plan of access to broadcasting for editorial advertisements, compelled access for this purpose would not violate the broadcasters' freedom of the press. In cable television, the great channel capacity<sup>191</sup> of cable systems has enabled the FCC to devise such a practical plan. A reasonable number of channels are dedicated for free public access on a first-come first-served basis.<sup>192</sup> Hence, the standard set in the *Democratic National Committee* case<sup>193</sup> has been met, no First Amendment interest of the cable operator has been infringed, and the access provision seems safe from attack on the ground of freedom of speech or press.

Another parallel in the FCC's treatment of broadcasters and cable operators is the rules designed to promote diversity in program service. In *National Broadcasting Co. v. United States*,<sup>194</sup> the Supreme Court upheld the FCC's chain broadcasting rules against First Amendment attack. The rules were designed to stimulate diversity in programming and to free the licensed broadcasters from restraints in contracts with networks, so that the broadcasters could better exercise their responsibility as trustees of the publicly owned channels.<sup>195</sup> In sustaining the constitutionality of the rules, the Court emphasized the natural limitations of the radio spectrum.<sup>196</sup> In *United States v. Midwest Video Corp.*,<sup>197</sup> the Supreme Court held that the FCC had jurisdiction and authority to issue a regulation<sup>198</sup> requiring cable operators to originate programming and provide facilities for local production and presentation of programs. Although the fact context was appropriate for a ruling on the freedom of press of the cable operators, the issue was not raised.

The FCC's program origination rule is intended to promote diver-

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191. The FCC requires cable capacity of at least twenty channels. 47 C.F.R. § 76.251(a)(1) (1973). When all channels are in use, the cable operator must activate another channel. 37 Fed. Reg. 3270, ¶ 126 (1972). As the cost of laying two cables simultaneously is much less per cable than laying cables at different times, in substantial metropolitan areas the practice is to lay two cables and to activate the second one when needed. Cables of forty channel capacity are in use, and cables of sixty and eighty channel capacity are anticipated. The requirement that the cable operator carry all local over-the-air television signals reduces the number of channels for other programming. 47 C.F.R. § 74.1103 (1973).

192. 47 C.F.R. § 76.251 (1973).

193. See text accompanying note 55 *supra*.

194. 319 U.S. 190 (1943). See text accompanying notes 41-44 *supra*.

195. See note 43 *supra*.

196. 319 U.S. at 226-27, *quoted in* text accompanying note 44 *supra*.

197. 406 U.S. 649 (1972).

198. 47 C.F.R. § 76.251 (1973).



sity of the cable operator's service and fulfillment of local needs for program service. There is a superficial distinction between cable television and broadcasting vis-à-vis the origination requirements in that a cable system has numerous channels while a broadcasting station has only one. However, if the cable operator were not required to originate programming and provide program origination facilities, the dire need for program service might not be fulfilled. Rather, the lease of channels by profit-making institutions for conduct of their business might well drive out of cable those persons and nonprofit institutions desiring to fill ascertained needs for service. While the state or local franchising authority has power to grant more than one franchise in the same geographical area,<sup>199</sup> as a practical matter the revenue available in the present state of the art will not support competing cable systems in the same geographical area.<sup>200</sup> In view of the monopoly position held by the cable operator, rules requiring the cable operator to originate programming and to provide facilities for presentation of programs produced locally do not contravene the cable operators' freedom of press.

### Regulatory Jurisdiction and Policy Questions

Although cable television came into being long after the enactment of the statutes providing for the regulation of wire and radio communications, the jurisdiction of the FCC over cable television is substantially plenary.<sup>201</sup> Thus, in *Midwest Video* the Supreme Court stated:

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199. 47 C.F.R. § 76.31 (1973).

200. In order to attract investment capital and to derive income rendering the cable operation profitable, the potential service area must include a substantial population and there must be a probability that from 40 to 60% of the population will subscribe. The requisite penetration for an economically sound cable system is a product of several factors: density of population; average income of the population in the service area; competition for investment of capital; and size of fees charged to subscribers. L.L. JOHNSON, *CABLE COMMUNICATIONS IN THE DAYTON MIAMI VALLEY: BASIC REPORT* ch. 5 (1972).

201. After first denying that it had jurisdiction over cable television (see note 187 *supra*), the FCC asserted "indirect" jurisdiction over microwave relay carriers used to import television signals for transmission by cable to subscribers. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963). In *Carter Mountain*, the FCC did not exercise jurisdiction over cable television on the basis of its common carrier characteristics; rather, it reasoned that it had jurisdiction over microwave relay carriers and that the cable television system was a mere extension of the microwave relay carriers. Such indirect jurisdiction inherently limits the FCC's power over cable television. For example, under indirect jurisdiction stemming from regulation of microwave relay carriers, it would be difficult to sustain a rule that cable operators must originate programming. In the FCC Second Report and Order on CATV, the commission asserted that it has "ancillary" jurisdiction of cable television to the degree

In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting.

The effect of the [program origination] regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming—the same objective underlying [the chain broadcasting] regulations sustained in *National Broadcasting Co. v. United States* . . . .<sup>202</sup>

Thus the FCC has jurisdiction and authority to apply the fairness doctrine, equal opportunities in political broadcasting doctrine, and diversity regulations such as the program origination rule, to cable television. Nevertheless, sound legislative policy suggests that when a communications revolution such as that inherent in the potential of cable television occurs, Congress should enact legislative standards to guide the FCC along the road of regulation.<sup>203</sup> As neither the First Amendment nor any jurisdictional block prevents the FCC from applying the fairness doctrine to cable television, the issue is one of policy: should the fairness doctrine, the related equal opportunities in political broadcasting doctrine, and the program origination requirement be applied to cable television?

Several governmental studies have dealt with these policy questions. In 1968, the President's Task Force on Communications Policy stressed diversity in program service as the major public policy goal for communications and recommended a regulatory policy which would encourage cable television to contribute to diversity.<sup>204</sup> This report did not address itself to whether the fairness doctrine should be applied to cable television. In 1971, the Sloan Commission on Cable Com-

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necessary to prevent frustration of its policies and regulations relating to broadcasting. 2 F.C.C.2d 725 (1966). In *United States v. Southwestern Cable Co.*, the Supreme Court upheld both the indirect and ancillary bases of the FCC's cable television jurisdiction. 392 U.S. 157 (1968).

202. *United States v. Midwest Video Corp.*, 406 U.S. 649, 667, 669 (1972) (emphasis added).

203. *Midwest Video* is a plurality decision. The minority of four strongly contended that the FCC did not have authority to require cable operators to originate programming. *Id.* at 677. Four other justices concluded that the FCC had such authority. *Id.* at 667, 669. Chief Justice Burger's opinion concurring with the latter four is marinated in doubt and he expressly so concurred "until Congress acts." *Id.* at 676. The jurisdiction and authority of the FCC over cable television should be determined by the Congress. Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 VAND. L. REV. 681, 701-02 (1972).

204. PRESIDENT'S TASK FORCE, ON COMMUNICATIONS POLICY, FINAL REPORT ch. 7 (1968).

munications recommended that the fairness doctrine should not be applied to "public access channels" and the companion equal opportunities in political broadcasting doctrine should not be applied to cable television.<sup>205</sup> The Sloan Commission reasoned that the large number of channels provided by cable television would result in contrasting opinions without regulation and that to require cable operators to provide time for the expression of contrasting viewpoints would discourage robust news reporting and public affairs programming.<sup>206</sup>

In 1974, the President's Cabinet Committee on Cable Communications recommended that in the regulation of cable television, the fairness doctrine, the equal opportunities in political broadcasting doctrine, and the program origination requirement be abandoned.<sup>207</sup> Further, this committee proposed that the requirement that cable operators provide free channels (one each for government and education, and one or more for the discussion of public issues) be revoked, with the possible exception of requiring a single public access channel.<sup>208</sup> The chairman of this committee was Dr. Clay T. Whitehead, then the director of the Office of Telecommunications Policy and adviser to Presi-

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205. SLOAN COMMISSION, REPORT ON CABLE COMMUNICATIONS, ON THE CABLE—THE TELEVISION OF ABUNDANCE 178 (1971).

206. *Id.* at 92-95, 121-22.

207. THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, CABLE, REPORT TO THE PRESIDENT 29, 38, 43 (1974).

208. *Id.* Congress entrusted regulation of communications to an "independent agency," the FCC. In the rule making function, such agencies exercise legislative power which Congress itself might exercise if it had time to fill in the details. Accordingly, independent agencies are responsible to the Congress rather than to the president. The seven-member commission, no more than a simple majority of whom may belong to the same political party, represents a wide segment of the public interest. Procedural safeguards are provided to assure that all parties in interest will have an opportunity to be heard.

During recent years the functions of the Executive Office of the President were increased greatly and power was shifted from the independent agencies to the White House. The Office of Telecommunications Policy, which advises the president on communications, made studies and recommendations in all areas of the FCC's rule making and policy making functions. As OTP does not conduct public hearings under the procedural safeguards applicable to independent agencies, it is able to reach conclusions before the FCC, abiding by traditional procedural requirements and safeguards, can reach a decision. The OTP's recommendations are then presented to the press, delivered in speeches before components of the communications industry, sent to the FCC with the approval of the president, or proposed to the Congress for enactment of legislation.

The foregoing activities of OTP in all areas of the FCC's competence have undermined the concept of the independent agency and subjected regulation of the sensitive communications journalistic function to domination by the executive branch. For an analysis of this problem and suggested solution, see Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communications*, 43 U. CIN. L. REV. 291 (1974).

dent Nixon on communications policy. During Dr. Whitehead's directorship, the OTP proposed legislation by the Congress defining the jurisdiction and authority of the FCC with regard to cable television.<sup>209</sup> The proposed statute would prohibit the FCC or any other governmental agency, federal, state, or local, from applying to cable television the fairness doctrine, the equal opportunities in political broadcasting doctrine, and the program origination requirement. The proposal would also forbid<sup>210</sup> any governmental agency from requiring dedicated channels, such as those now required by the FCC,<sup>211</sup> except one for public access.

While the number of channels on most existing cable systems is quite limited, the assumption is that the potential of cable to provide an unlimited number of channels will be realized in the near future.<sup>212</sup> Thus, all who desire access to cable, it is asserted, will be granted ac-

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209. OTP, DRAFT OF THE CABLE COMMUNICATIONS ACT OF 1974: SUMMARY AND ANALYSIS (1973) ("A bill to amend the Communications Act of 1934 to create a national policy respecting cable communications"). The OTP proposal has not been introduced as a bill but negotiations looking toward such a bill having reasonable assurance of enactment have been under way for some time. The author has been informed that the FCC was invited to comment on the proposal and did so.

210. *Id.* § 709(b).

211. See note 165 & accompanying text *supra*.

212. The FCC requires a cable capacity, in communities of significant size, of 120 Megahertz. 47 C.F.R. § 76.251(a)(1) (1973). A channel on cable television, like an over-the-air television channel has a bandwidth of 6 Megahertz. The coaxial cable in general use today carries frequencies between 3 and 270 Megahertz. Arithmetically, the FCC required cable capacity would carry twenty channels, and the coaxial cable in general use would carry forty-four channels. However, several factors reduce the number of usable channels. The cable operator is required by the FCC to carry "on request of the relevant station licensee or permittee" all local over-the-air broadcasting signals. *Id.* §§ 76.59(a)(1), .61(a)(1) (1973). The difference in time required for a broadcasting signal to reach the same receiver by the over-the-air route and the cable route creates a "ghost" effect. To avoid this, the over-the-air signals are converted to other frequencies before being transmitted on the cable, and the frequencies on the cable corresponding with the over-the-air frequencies are avoided. L. JOHNSON, CABLE COMMUNICATIONS IN THE DAYTON MIAMI VALLEY: SUMMARY REPORT 8 (1972). If a converter is used on the receiving set, the ghost effect can be avoided and with improvements in technology these channels can be used. As in broadcasting, separation between channels must be maintained, and intermodulation and harmonic interference problems, which are aggravated by the necessity of using amplifiers on the cable, further reduce the number of usable channels. In the existing state of the art a 270 Megahertz cable can carry between twenty and twenty-five channels. Installing two cables and a switch on the terminal to change cable connections will double the number of usable channels. In large metropolitan areas, typically two cables are installed. In a large percentage of homes the only receiver is a VHF (very high frequency) television receiver. Regardless of the number of channels on the cable, such a receiver can receive only twelve channels unless a converter is attached to the receiver. For an up to date description of cable systems, see BAER, *supra* note 168, at 1-39.

cess. Since, unlike broadcasting, there is no limited access problem, it is argued that there is no need to apply the fairness doctrine, equal opportunities in political broadcasting doctrine, the program origination requirement, or the public access channel requirement to cable television.<sup>213</sup>

### The Case for Regulation

Freedom of cable television to develop in accordance with the demands of a free market has superficial appeal. It gives the cable operator discretion to develop the content of cable service. However, because of economic constraints and fragmentation of audience problems, it is unlikely that the public interest in cable television service will be served without regulation.

The number of channels in the typical cable television system is quite limited.<sup>214</sup> The cost of constructing a cable system of high channel capacity is great and in the present stage of development of cable television revenue is small.<sup>215</sup> When all channels are substantially in continuous use, the FCC's rules require the cable operator to provide another channel.<sup>216</sup> However, to provide one channel after the capacity of the original cable is exhausted requires repeating the laying of cable and wiring throughout the system. Under existing economic conditions it is highly unlikely that the FCC will enforce this rule.

The FCC has decided that the rates charged by cable operators should not be set,<sup>217</sup> as they are in the case of common carriers. Cable operators may be expected to charge what the traffic will bear. In such a free trade market, business has a competitive advantage in gaining access over nonprofit organizations, groups and individuals. Thus rural areas and low income sections of urban communities may not have access to cable systems without a governmental subsidy.

The public access channel which the FCC requires cable operators to provide is not adequate, by itself, to serve the purpose of the fairness doctrine and companion equal opportunities in political broadcasting doctrine. The public access channel is available on a first-come, first-

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213. Simmons, *The Fairness Doctrine and Cable Television*, 11 HARV. J. LEGIS. 629 (1974). For an argument in support of application of the fairness doctrine to cable television, see Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972).

214. See note 212 *supra*.

215. For a current survey of the economics of cable television, see BAER, *supra* note 168, at 40-65.

216. 47 C.F.R. § 76.251(a)(8) (1973).

217. *Id.* § 76.251(a)(11)(iii).

served basis to any person for any purpose he chooses.<sup>218</sup> While such a "soapbox" channel serves a valuable public interest purpose, it does not even proximately assure that all meritorious issues will be ventilated, that appropriate spokesmen on the issues will gain access, or that all sides will be presented. If a political candidate uses the channel, there is no assurance that the opposing candidate can get in line in time to make an effective response.

In broadcasting, the licensee determines the public issues that deserve airing and selects appropriate spokesmen for each side. Political candidates are granted access for a prompt appearance following that of their opponents. The public interest demands that some similar system of choosing issues for presentation on cable television be formulated. The responsibility might well be placed on the cable operator. Another approach would be to establish representative local committees, as discussed previously,<sup>219</sup> having authority to select the issues meriting presentation on the dedicated channels. The local committee should be representative of all significant groups and interests in the community served. As observed earlier in this article,<sup>220</sup> such a practical plan of access to cable television to present contrasting viewpoints on public issues would meet the Supreme Court's standard and would not infringe upon the freedom of the press of cable operators. As in broadcasting, the First Amendment interest of listeners and viewers must be paramount among the various interests to be accommodated.

Even assuming that cable capacity will reach a level that all who wish access to cable television can be accommodated, informed public opinion and a viable political process via cable television may not occur unless the fairness doctrine and equal opportunities in political broadcasting doctrine are applied to cable television. Many who have something meritorious to say do not have the means to purchase time on the cable. Unless a reasonable number of channels are dedicated without charge for use in discussing public issues, only those who can pay their way will be heard. Moreover, even those who can pay may find their message is less effective because of fragmentation of audiences. In broadcasting, it has been practical to discuss public issues because the number of channels is small, regular patterns of viewing develop, and a substantial part of the audience which hear one side of an issue in a broadcast will be tuned to the same station when the other side is

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218. *Id.* § 76.251(a)(4).

219. See text accompanying notes 63-64 *supra*.

220. *Id.*

presented in a later broadcast. In cable television, the greater number of channels may be expected to divide the subscribers into many smaller audiences. And there is no assurance that even this small group would be reached by a spokesman seeking to present the other side of an issue previously communicated over a channel of the cable system. Similarly, political candidates would reach substantially different audiences. Under these circumstances, people would form their opinions on issues on the basis of hearing one side and would vote for political candidates on the basis of hearing only one candidate.

To assure that the people have an opportunity to hear all sides of public issues and opposing political candidates, it is essential that a reasonable number of channels be dedicated to the discussion of public issues and the conduct of political campaigns. As to these channels, the fairness doctrine and companion equal opportunities in political broadcasting doctrine should apply. This is contemplated by the FCC's existing rule, which applies these doctrines only to those channels subject to program origination and not to the public access channel or to leased channels.<sup>221</sup> Of course, to render the equal opportunities in political broadcasting doctrine effective in cable television, it may be necessary to limit political campaign appearances to the program origination channels or to grant the opposing candidates access to the same channel.

Some may say that broadcasting adequately serves the need for discussion of public issues and conduct of political campaigns. However, the potential of cable to provide two-way communication renders the medium much more effective than broadcasting for participation by the public in decisionmaking and the political process. Through cable television it is possible to have town meetings at the local, regional, and national levels.

It would be most unfortunate if, before cable television has had a chance to show what it can contribute to the formation of opinion and the political process, the requirement that cable television serve the public interest should be abandoned and this revolutionary electronic medium should be permitted to serve only desires of business. The enormous potential of cable television to serve the public interest has been described above.<sup>222</sup> In the public interest, the FCC should con-

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221. 47 C.F.R. §§ 76.205, .209 (1973). The FCC wisely required cable operators to engage in program origination, appreciating that this would tend to develop audience interest and loyalties much as in broadcasting, and applied the fairness and equal opportunities doctrines to these channels.

222. See text accompanying notes 164-170 *supra*.

tinue to apply to cable television the program origination rule and, as to channels carrying such program originations, should apply the fairness and equal opportunities doctrines.

### Conclusion

The preferred position given to freedom of speech and press under our Constitution recognizes the importance of the free exchange of ideas to self-government. Yet the cosmopolitan character of our people impedes achievement of consensus on solutions to our increasingly complex problems, and our citizens tend to give up the effort to understand the problems and become discouraged from participation in decisionmaking. Decisionmaking is thereby entrusted more and more to an elite.

The mass media have the potential to inform the people and thereby to encourage their responsible participation in self-government. However, the mass media are big business, requiring large aggregates of capital and typically are owned and managed by persons who quite naturally share and air the point of view of the wealthy end of the economic spectrum. Commercial advertising also affects media content. These tendencies result in neglect of some issues of importance to middle and low income groups and in the presentation of only one side of other issues. Consequently, an uninformed people withdraw from participation in deciding many issues and reach unsound decisions on others.

In broadcasting, participation of the people in decisionmaking and the political process is encouraged through governmental regulation. The fairness doctrine requires licensed broadcasters to allocate reasonable time for the presentation of public issues and to present all sides of such issues. Political candidates must be given equal opportunities in the use of broadcasting facilities for political purposes. Broadcasters are obliged—under a standard of reasonableness—to fulfill the program needs of the community, resulting in a degree of diversity of programming serving civic, social, and cultural needs. The Supreme Court has held that such regulation of broadcasting in the public interest does not violate the freedom of press of the licensed broadcasters. The basis for this conclusion is two-fold. First, the number of broadcasting channels is limited by the natural characteristics of the radio spectrum so that not all who wish to broadcast can be accommodated. Second, freedom of speech and press in broadcasting involves interests of the broadcasters, those desiring access to the facilities, and the listeners and



viewers; in the balancing of these interests that of the latter is paramount.

The print media, on the other hand, have been declared by the Supreme Court to be free from governmental regulation of the content published. Thus, a requirement by government that a newspaper grant a right of reply to a political candidate whose character has been personally attacked during a campaign is an unconstitutional infringement of the freedom of press of the print media. Further, on First Amendment grounds, the Supreme Court has substantially immunized the print media from liability for false defamation against political candidates and public officials or figures.

Economic limitations on the number of daily newspapers have resulted in heavier concentration of local newspaper ownership than of local broadcasting stations. Nevertheless, the Supreme Court has refused to equate the economic limitation of the print media with the natural limitation of broadcasting. Moreover, the Court has refused to extend to the print media the concept utilized in its broadcasting decisions that viewers and listeners hold the paramount position in the accommodation of the various First Amendment interests. The Supreme Court gives no weight to the interest of readers of a newspaper in being informed, rather than misinformed, on public issues and the qualifications of political candidates. The capsheaf on our societal values is the political process and decision of public issues. The Supreme Court's view of freedom of press as absolute leaves the electorate at the mercy of the print media. It is submitted that the Supreme Court could have required daily newspapers to grant a right of reply to political candidates whose character is attacked during a campaign without eroding any of the values on which freedom of press and speech are based.

Nevertheless, valid distinctions can be drawn between broadcasting and the print media for purposes of governmental regulation in the interest of the need of the people to know. Natural limitation of the radio spectrum is distinguishable from economic limitation. The radio channels are owned by the people, while the print media own their presses. The development of nationwide broadcasting networks largely limits national and international news and opinion to three sources—the ABC, CBS and NBC networks. As highly concentrated as daily newspaper ownership is, the sources of national and international news and opinion are relatively numerous.

The freedom of the print media should be celebrated with journalistic responsibility. Voluntary policies of granting access for viewpoints

opposed to the newspaper's editorial point of view and for reply to personal attack should be adopted. Management could be aided in administering such policies by a committee of citizens representative of the community.

Potentially, cable television can serve the need of the people to know far better than can broadcasting or the print media. Two way communication by cable television makes possible the restoration of the town meeting and the establishment of state, regional, and national meetings of the people. The FCC's rules governing cable television took account of this potential to fulfill the people's need to know. Cable operators were required to provide public access channels, to originate programming, and, on the program origination channels, to comply with the fairness doctrine and the equal opportunities in political broadcasting doctrine—in the same way that these doctrines had been applied in broadcasting. While the issue of freedom of speech and press has not been considered by the Supreme Court in cable television, it is clear that the rules do not violate the First Amendment.

Although applying the fairness doctrine and related doctrines to cable television does not violate the cable operators' freedom of the press, a strong movement is under way to prohibit any governmental agency from requiring cable operators (1) to present both sides of controversial issues which are communicated over program origination channels, (2) to grant equal opportunities to opposing political candidates, (3) to originate programming, or (4) to provide a free access channel to government or education. Under the proposed policy, the cable operator could only be required to provide one free soapbox channel. If the current policy move is successful, cable television will be limited to serving business, professional, entertainment, and other profit-making institutions.

This limited use would waste a valuable asset. Cable television should not only provide opportunity for profit, but also serve the need of the people to know. Potentially cable television provides a means of communication of far greater capacity to inform the people than broadcasting or the print media. Cable television may provide our last chance to fulfill the need of the people to know. Unless advantage is taken of this opportunity, our society may lose the race between education and catastrophe. The policy of Congress and the FCC should

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**Author's Note:** Recently, the FCC abandoned its requirement that cable television operators originate programming. Amendment of Part 76, Subpart G, of the Commission's Rules and Regulations Relative to Program Origination by Cable Television

further the larger and more effective use of cable television in the public interest of self-government.

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Systems, Docket No. 19988, 32 P & F RADIO REG. 2d at 123. Since the program origination rule had been suspended since the early 1970's, this action by the FCC is merely formal recognition of ongoing policy. See note 181 *supra*. The arguments set forth in this article are not changed by this development, however unfortunate it may be. See text accompanying notes 197-200 *supra*.